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22 **UNITED STATES DISTRICT COURT**  
23 **NORTHERN DISTRICT OF CALIFORNIA**

24 Michael Zeleny,

25 Plaintiff,

26 vs.

27 Edmund G. Brown, Jr., et al.,

28 Defendants.

Case No. 17-cv-07357-RS

**NON-PARTY NEA'S REPLY IN SUPPORT  
OF ITS MOTION TO QUASH**

Date: March 7, 2019  
Time: 1:30  
Courtroom: 3, 17th Floor



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1 Plaintiff's Opposition to the Motion of New Enterprise Associates to Quash ("Opposition") rests,  
 2 at bottom, on two proffered legal propositions, both of which are simply wrong: first, that "truth" is a  
 3 defense to a charge of obscenity (it is not); and second, that discovery into the "truth" of challenged speech  
 4 from a third party is therefore relevant (it is not). Under *Miller v. United States*, 413 U.S. 15, 24 (1973),  
 5 whether Plaintiff's speech "as a whole, lacks serious literary, artistic, political or scientific value" is  
 6 determined by an objective test, based on the content of the challenged speech; whether it is true or untrue  
 7 is not the First Amendment's concern.

8 In a strained effort to make his Subpoena for some twenty years of irrelevant information seem on  
 9 point, Plaintiff attempts to reframe the entire gravamen of his Complaint. In his Complaint, Plaintiff  
 10 plainly asserts that public officials denied Plaintiff a permit *based on their judgment* as to the obscenity  
 11 of its content. (Compl. ¶¶ 85; 97 ("The City has prohibited Zeleny from exercising his right to free speech  
 12 based on the content of his protests. A declaration is necessary that Zeleny's protests and the materials  
 13 used by him in those protests are not obscene as a matter of law...."); ¶ 100 ("The City of Menlo Park and  
 14 Bertini have, under threat of criminal prosecution, prohibited Zeleny from engaging in his lawful protests  
 15 based on the content of his speech, claiming that they will prosecute Zeleny for obscenity as to minors.")).<sup>1</sup>

16 Nothing in Plaintiff's Complaint (or the law) renders anything that NEA knew, believed, or did  
 17 relevant to Plaintiff's dispute with these public officials. In an attempt to obscure this fundamental point,  
 18 Plaintiff's Opposition radically departs from his own pleading, arguing that these public officials did not  
 19 exercise their own judgment as to obscenity after all, but rather that NEA was somehow "behind it all."<sup>2</sup>  
 20 There are, however, no factual allegations in the Complaint to that effect, and hence no basis in the  
 21 pleadings for this discovery. *Robert Half Int'l Inc. v. Ainsworth*, No. 14-CV-2481-WQH DHB, 2015 WL  
 22 4662429, at \*4 (S.D. Cal. Aug. 6, 2015) (discovery should be limited to the claims and defenses of the

23  
 24 <sup>1</sup> As noted in NEA's opening brief, it does not appear that Plaintiff has in fact been denied a permit because the proposed  
 25 protest is obscene; he has been denied a permit because his application was incomplete and there were concerns regarding the  
 time, place and manner of the proposed protests. (NEA MTQ 11:3-5.)

26 <sup>2</sup> The closest Plaintiff's Complaint comes to alleging that NEA is the cause of the Defendants' actions is the allegation that  
 27 "Plaintiff is informed and believes, and on that basis alleges, that the City has continually denied Zeleny's requests for permits  
 28 because it disagrees with the substance of his message, and does not believe that his statement about Min Zhu's conduct or  
 WebEx's and NEA's tacit approval of that conduct are true." (Compl. ¶ 85.) This is a far cry from what Plaintiff now seeks  
 to assert in his Opposition: that the Defendants are working at the behest of NEA. Ironically, Plaintiff himself admits in his  
 Opposition that *only one* of his multitude of document requests asks for communications between NEA and the City, and  
 Plaintiff further suggests that NEA need not produce any documents that the City produces anyway. (Opp. 12:20-21.)



parties). The fact that Plaintiff felt it necessary to undertake this strained effort itself betrays the impropriety of his Subpoena. NEA is not a defendant in this case, and its awareness of Plaintiff's salacious allegations regarding Min Zhu's treatment of his daughter, any assessment NEA may have made of those allegations, and any action NEA may have taken relative to Min Zhu as a result, are not at issue here. All that is at issue is whether the City of Menlo Park, including its civic officials and its police department, acted wrongly in denying Plaintiff a permit to air his tawdry, second-hand grievances in the time, place and manner that he wanted to air them. Whatever NEA may have thought of Plaintiff's allegations, or done in response to them, is simply irrelevant. In addition to these fundamental issues, Plaintiff's Opposition disingenuously mischaracterizes the very cases upon which it relies for key propositions, as well as the matters of public record that it purports to present, all of which combine to show that Plaintiff's Subpoena to NEA is legally unfounded and wholly improper. Accordingly, the Court should quash the Subpoena, and issue a protective order to protect NEA and its current and former personnel from further subpoenas from Plaintiff.<sup>3</sup>

#### **I. THE OVERBROAD SUBPOENA SEEKS IRRELEVANT INFORMATION**

Plaintiff has failed to demonstrate that the discovery sought from NEA "is relevant and material to the allegations and claims at issue in the proceedings," requiring that the Subpoena be quashed. *Optimize Tech. Sols., LLC v. Staples, Inc.*, No. 14-mc-80095-LHK (HRL), 2014 WL 1477651, at \*2 (N.D. Cal. Apr. 14, 2014) (citation omitted). In addition, Plaintiff's Opposition utterly ignores the mandate of FRCP 26 that discovery must be proportional to the needs of the case. *See* Chief Justice John Roberts, 2015 Year-End Report on the Federal Judiciary, 6 (2015) (amendment to Rule 26 "crystalizes the concept

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<sup>3</sup> Despite the fact that NEA's motion to quash was filed on January 25, 2019, Plaintiff has attempted to seek the identical documents from Richard Kramlich, who is a retired general partner of NEA, and Scott Sandell, the current managing general partner of NEA. (Worcester Decl., Exhs. B & C.) First, Mr. Sandell was not properly served, rendering his subpoena subject to a motion to quash, as the process server did not serve Mr. Sandell in hand, but rather left the documents outside of NEA's Menlo Park business address. *Fujikura Ltd. v. Finisar Corp.*, No. 15MC80110HRLJSC, 2015 WL 5782351, at \*5-6 (N.D. Cal. Oct. 5, 2015) (Rule 45(b)(1) provides, in relevant part, that "[s]ervice of a subpoena upon a person named therein shall be made by delivering a copy thereof to such person[.] *The majority of courts understand 'delivering' to require personal service of the subpoena.*") (emphasis added). Second, both subpoenas seek essentially the same documents that are sought by the Subpoena to NEA, which provides an independent basis to quash them. (*Compare* Lane Decl., Exh. A with Worcester Decl., Exhs. B & C); *Gourmet Gallery Crown Bay, Inc. v. Crown Bay Marina, L.P.*, No. ST-2014-CV-513, 2016 WL 7107879, at \*2 (V.I. Super. Nov. 30, 2016) (as FRCP 26(b)(2)(C)(i) provides that "the court must limit the frequency or extent of discovery.... if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative," court quashed vast majority of subpoena to individual where document requests were duplicative of those made to another third party).



1 of reasonable limits on discovery through increased reliance on the common-sense concepts of  
 2 proportionality”). Plaintiff has failed to provide any rationale for the breadth of his Subpoena which, *inter*  
 3 *alia*, seeks documents from ten years prior to any of Plaintiff’s protests and seventeen years prior to  
 4 passage of the statutes whose enforcement and validity Plaintiff challenges, and it also seeks information  
 5 that has *nothing to do* with Plaintiff’s protests. (*See* Lane Decl., Exh. A, Request No. 22 (“All documents  
 6 Regarding the involvement of NEA or any individuals affiliated with NEA in discussions or efforts to  
 7 address allegations of industrial espionage on behalf of the Peoples’ Republic of China by WebEx and/or  
 8 Min Zhu.”); Request No. 23 (“All documents Regarding your participation or involvement in discussions  
 9 or efforts to address any and all investigations by federal law enforcement authorities of allegations of  
 10 industrial espionage on behalf of the People’s Republic of China by WebEx and/or Min Zhu.”).) Finally,  
 11 Plaintiff’s last-minute efforts to narrow the information sought in an attempt to demonstrate that the  
 12 Subpoena is not overly burdensome should be rejected, as Plaintiff previously refused to make such  
 13 accommodations.

14 **A. PLAINTIFF HAS FAILED TO DEMONSTRATE THAT THE SUBPOENA**  
 15 **SEEKS RELEVANT DOCUMENTS**

16 Plaintiff’s Opposition claims that the discovery sought from NEA is relevant for two reasons.  
 17 First, on the basis of an utter non-sequitur: that the discovery is necessary to show that “the City has  
 18 banned his protests based on their content – *i.e.*, at NEA’s behest.”<sup>4</sup> (Opp. 9:17-18; 10:5 (“Zeleny has the  
 19

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20 <sup>4</sup> In an attempt to bolster his contention that California law enforcement acts at NEA’s behest, Plaintiff makes much of a  
 21 criminal prosecution brought in 2012 by the San Mateo County DA’s office for carrying a concealed firearm, in which Plaintiff  
 22 was acquitted. (Opp. 5:11-17.) What that prosecution has to do with this case is utterly obscure, as this case involves the denial  
 of permits some three and four years later, in 2015 and 2016, by civic authorities representing the City of Menlo Park, and  
 statements allegedly made by Commander Bertini in that context.

23 Moreover, Plaintiff has already had the opportunity, in August 2016, to question Commander Bertini as to what, if any,  
 24 interactions he had had with NEA:

25 Affeld: Have you ever met with anybody from NEA regarding the criminal prosecution of Mr. Zeleny?

26 Bertini: Not regarding the criminal prosecution of Mr. Zeleny, no.

27 Affeld: Have you met with NEA in any other capacity?

28 Bertini: Yes.

Affeld: In what, in what capacity?



1 right to prove that the City is acting at NEA's behest.".) Second, that the discovery is necessary to show  
 2 that his protests have "serious redeeming value." (Opp. 11:13-14). Both justifications fail to establish  
 3 that the information sought is relevant.

4 As to the first point, nowhere in Plaintiff's Complaint does it allege that any Defendant has taken  
 5 action "at NEA's behest," and that proposition does not remotely follow from Plaintiff's allegation that  
 6 the City banned his protests based on a judgment as to their obscene content. *Shinedling v. Sunbeam Prod.*  
 7 *Inc.*, No. EDCV12438CJCSPX, 2014 WL 12600964, at \*2 (C.D. Cal. Mar. 4, 2014) ("Requested  
 8 discovery is not relevant to the subject matter in a pending action if the inquiry is only based on the  
 9 requesting party's mere suspicion or speculation."); *Micro Motion Inc. v. Kane Steel Co., Inc.*, 894 F.2d  
 10 1318, 1327 (Fed. Cir. 1990) ("The discovery rules are designed to assist a party prove a claim it reasonably  
 11 believes to be viable *without discovery*, not to find out if it has any basis for a claim."). Far from making  
 12 such an allegation, the Complaint repeatedly asserts that Plaintiff seeks a declaration that his "protests and  
 13 the materials used by him in those protests are not obscene as a matter of law." (Compl. ¶¶ 97, 100-101,  
 14 107, 119.)<sup>5</sup>

15 Moreover, whether Plaintiff's planned protest is or is not obscene as a matter of law has nothing  
 16 to do with NEA. That determination is based upon the test articulated in *Miller v. California*, 413 U.S.

17  
 18 Bertini: I met with the, all the stakeholders that were complaining about Mr. Zeleny's protests on two or three  
 19 occasions.

20 Affeld: Who were the stakeholders?

21 Bertini: I don't know exactly who was involved but I know it was, it was the property owners, Stanford, it was NEA  
 22 of the Rosewood property, I know the sheriff's department was there, the DA's office and I'm not quite sure  
 23 who else was there.

(Worcester Decl., Exh. A, pg. 20.)

24 <sup>5</sup> Plaintiff's Complaint also alleges that Defendants have improperly interpreted various statutes, but once again, nowhere does  
 25 Plaintiff's Complaint allege that the interpretation is at the behest of NEA. See Compl. ¶ 106 ("The City of Menlo Park has  
 26 improperly interpreted the exceptions to California's firearms carry bans, California Penal Code §§ 25510, 26375, and 26405,  
 27 as applicable to authorized participants in a motion picture, television or video production, or entertainment event, to require  
 28 the City's approval of the production or event itself, and the use of firearms and 'authorized participants' in that production or  
 event."); ¶ 114 ("The City has misinterpreted California Penal Code §§ 25510, 26375, and 26405...."); ¶ 124 ("The City..[has  
 refused] to grant any such permits based on the content of Zeleny's speech."); ¶ 125 ("The City and Bertini have violated  
 Zeleny's rights to engage in protected speech by threatening him with criminal prosecution for engaging in protected activity,  
 including threatening criminal prosecution based on the content of Zeleny's speech and his peaceful use of unloaded firearms  
 as part of that speech.").



1 15, 24 (1973), which is an objective test of the challenged speech itself, and nowhere does the test for  
 2 obscenity involve a determination of whether the speech or posters used in a protest are true or false.  
 3 Plaintiff's contention to the contrary, that "[e]xposing the truth is a hallmark of speech with serious value  
 4 entitled to First Amendment protection" (Opp. 11:10-11), is simply wrong. *U.S. v. Alvarez*, 567 U.S. 709,  
 5 721-22 (2012) (rejecting notion that "false" speech is unprotected under the First Amendment). If  
 6 Plaintiff's position were the law, then every crack-pot, off-color First Amendment protest case would  
 7 become a trial on the question of whether the protester's position was nonetheless "true," and turn the  
 8 First Amendment shield – which protects free expression on the part of *speakers* – into a weapon to subject  
 9 the *targets* of the challenged speech to sweeping discovery into their knowledge, investigation and action  
 10 with respect to the substance of the challenged protest. That is not our law, and it has never been our law.  
 11 Such inquiries may have their place, but they are not part of the First Amendment.

12 Further, the one case Plaintiff relies upon for this proposition, *Chaplinsky v. New Hampshire*, 315  
 13 U.S. 568 (1942), stands for no such thing. In fact, it demonstrates that truth is *irrelevant* to any such  
 14 determination. There, the United States Supreme Court upheld the conviction of a Jehovah's Witness for  
 15 violating a statute that prohibited addressing any offensive, derisive or annoying word to another person  
 16 who was lawfully in the street or other public place. The Supreme Court held that the statute was not  
 17 unconstitutional. *Id.* at 571-73. In so ruling, the Court observed that the trial court had excluded  
 18 immaterial testimony relating to the individual's "mission," and that this was approved by the appellate  
 19 court below, which held that "neither provocation *nor the truth of the utterance* would constitute a defense  
 20 to the charge." *Id.* at 570 (emphasis added). After holding that the statute was, in fact, constitutional, the  
 21 Court further held that "[t]he refusal of the state court to admit evidence of provocation and evidence  
 22 bearing on the truth or falsity of the utterances is open to no Constitutional objection." *Id.* at 574  
 23 (emphasis added). Consequently, discovery regarding the "truth" of NEA's past business relationship  
 24 with Min Zhu and WebEx, when NEA learned about Plaintiff's allegations regarding Min Zhu, or what  
 25 NEA may have done relative to Min Zhu as a result of learning of Plaintiff's allegations, has nothing to  
 26 do with whether or not Plaintiff's protests are obscene.<sup>6</sup>

27  
 28 <sup>6</sup> To be clear, to date no one has determined that Plaintiff's proposed protest is, in fact, obscene, and Plaintiff's assertions that  
 he has been "threatened" with criminal prosecution appear unfounded. Both Plaintiff and his counsel claim that during an  
 August 11, 2016 hearing, Defendant Bertini stated that "he and the community considered my protests offensive. He took



particular issue with one of the cartoons of Min Zhu engaged in sexual activity. Chief Bertini stated that if [Zeleny] continued to display this artwork, he **would** have [Zeleny] arrested for ‘obscenity as to minors.’” (Zeleny Decl. ¶ 44 (emphasis added); Affeld Decl. ¶ 11.) A review of the transcript of this public hearing demonstrates that no such threats were made:

Affeld: Commander, I want to start where you ended. You showed us Penal Code Section 313.1.

Bertini: Correct.

Affeld: And you also have a graphic from Mr. Zeleny’s LiveJournal.

Bertini: Correct.

Affeld: The page in the lower righthand corner, there’s a print date of July 21, 2015 at 4:04 p.m.

Bertini: Correct.

Affeld: Is that the date that you printed this out?

Bertini: Yes, sir.

Affeld: And did you personally do that or somebody else at the city?

Bertini: No. I did.

Affeld: Was this something that you included or anybody else on behalf of the city included in any of the previous denials at the first instance around any of the other layers of appeal?

Bertini: No.

Affeld: You, you were aware of this for more than a year, but it didn’t find its way into any of the appellate record until today?

Bertini: That’s correct.

Affeld: Okay. And your point in including this graphic, it’s dated December 14th, 2012. Do you see that?

Bertini: Yes, sir.

Affeld: And it depicts some individuals and some sexual activity?

Bertini: Correct.

Affeld: Your point is that a display of this kind in public might harm minors?

Bertini: **My point is that if it were to be displayed in public and we had a complaining parent of a minor who was exposed to it, that 313.1 could be a section that could be used to make an arrest or a prosecution.**

Affeld: And so it. Did Mr. Zeleny tell you that this graphic that’s depicted from December 14, 2012 was going to be part of the protest?

Bertini: My understanding was that I, this was the graphic that he was proposing to display on the video screen.

Affeld: **Okay. So it was the content of this graphic that you found as part of the grounds for denying Mr. Zeleny’s application?**

Bertini: **No, I just, I just bring that up now as another, another reason why. It was never, it was never brought up before. It was not in the record before.**

Affeld: Okay. The new reason today, regarding this graphic, has to do with the content of the graphic. Is that right?

Bertini: That’s correct.

Affeld: Do you know if there’s been any determination as to whether this graphic is obscene?

Bertini: That would have to be determined in a court of law.

Affeld: Has that happened?

Bertini: There’ve been no arrest. I’m talking about a criminal case.



1 In addition, Plaintiff relies upon *Puente Arizona v. Arpaio*, 314 F.R.D. 664 (2016), for the  
 2 proposition that “Zeleny has the right to prove that the City is acting at NEA’s behest.” (Opp. 10:5-7.)  
 3 The case supports no such thing. Rather, in *Puente Arizona*, an immigrant advocacy group brought an  
 4 action against the state and county, challenging the constitutionality of the Arizona identity theft statutes,  
 5 which made it a crime to use another person’s information with the intent to obtain employment. *Id.* at  
 6 67. The plaintiff group served a subpoena duces tecum on the Arizona Legislature and the former state  
 7 senator who sponsored the challenged statute. *Id.* at 666. The Legislature and senator produced a variety  
 8 of documents, but withheld others on legislative privilege and First Amendment grounds. *Id.* at 667. In  
 9 connection with *denying* the plaintiff group’s motion to compel the production of privileged documents,<sup>7</sup>  
 10 the court first observed that, unlike here, no one contended that the requested documents were  
 11 disproportionate to the needs of the case. *Id.* at 668. Next, the court found that the requested documents  
 12 were relevant because “contemporary statements *by members of the decision making body*, minutes of its  
 13 meetings, or reports may also be relevant” to determine whether a statute violates the constitution. *Id.*  
 14 (emphasis added) (to determine whether a state statute violates the Supremacy Clause by regulating a  
 15 preempted subject matter courts consider “any specific expressions of legislative intent in the statute itself  
 16 as well as the legislative history”). The motion, again, was denied on grounds of privilege. *Id.* at 670.

17 Nothing in *Puente Arizona* stands for the proposition that Plaintiff is entitled to discovery from a  
 18 third-party, such as NEA, that was indisputably *not* a member of any decision-making body involved with  
 19 passing the statutes at issue here. Moreover, as shown in NEA’s opening brief, none of the document  
 20 requests and topics in the Subpoena are tailored to elicit documents or information about the enactment of  
 21 the statutes at issue here. (NEA MTQ 9:18-10:13.) As Plaintiff has failed to demonstrate that the

22  
 23 Affeld: Okay.

24 Bertini: And it hasn’t been displayed yet, so no arrest has been made so it can’t have gone to court.

25 Affeld: So, so as of today, there’s been no adjudication that you’re aware of to the effect that this graphic is obscene.  
 Am I right?

26 Bertini: That’s correct.

27 (Worcester Decl., Exh. A, pp 5-7) (emphasis added.) Notably, at no time did Defendant Bertini state that any actions he may  
 take were at the behest of NEA.

28 <sup>7</sup> Plaintiff mistakenly asserts that the court “enforced the subpoena,” when it actually denied a motion to compel privileged  
 documents that the subpoena sought. (Opp. at 10:6); *Id.* at 670 (“The Court concludes that these emails are protected by the  
 legislative privilege.”).



1 Subpoena seeks relevant information, the Subpoena should be quashed.

2 **B. THE SUBPOENA IS FATALLY OVERBROAD**

3 Plaintiff proceeds to set forth a hodgepodge of disjointed justifications for why his Subpoena is  
4 not fatally overbroad – none of which are supported by the facts or the case law Plaintiff relies on.

5 Plaintiff first asserts that NEA’s objections to the Subpoena are entitled to little weight, because  
6 NEA has “an interest in the outcome of the underlying case.” (Opp. 13:10-12.) Once again, none of the  
7 cases that Plaintiff cites support his position. In each case cited by Plaintiff, a nonparty sought *costs*  
8 related to complying with a subpoena, as opposed to objecting to the scope of the subpoena itself. In  
9 connection with deciding whether cost-shifting was appropriate – that is, whether the costs incurred were  
10 “significant” – each case took into account whether the third party had an interest in the outcome of the  
11 litigation. In none of these cases did a court conclude that a third-party’s purported interest in the outcome  
12 of the underlying case was relevant to whether the scope of the subpoena itself was appropriate:

- 13 • In *Cornell v. Columbus McKinnon Corp.*, No. 13-2188, 2015 WL 4747260 (N.D. Cal. Aug. 11,  
14 2015) (Opp. 13:16-19), a Federal Express (“FedEx”) employee who had been injured while  
15 performing his job duties at an airport sued the airport and others. *Id.* at \*1. FedEx had refused to  
16 comply with any discovery absent cost-shifting, as provided for in Rule 45. *Id.* The court ordered  
17 FedEx to comply and deferred ruling on the issue of cost-shifting. *Id.* When it finally addressed  
18 FedEx’s motion for costs associated with discovery, it noted that FedEx was the individual’s  
19 employer at the time of the incident, and had filed a lien against any judgment or settlement in  
20 plaintiff’s favor in order to recoup worker’s compensation benefits (which exceeded \$200,000 and  
21 were growing). *Id.* at \*3. Consequently, as “FedEx’s interest in this case is therefore tantamount  
22 to that of a party,” and FedEx had the ability to pay, the court denied FedEx’s motion for costs.  
23 *Id.* at \*3, 5.
- 24 • In *Tutor-Saliba Corp. v. United States*, 32 Fed. Cl. 609 (1995) (Opp. 13:13-15), nonparty Ellerbe  
25 Beckett, Inc. (“EBI”) was the architect of a federal office building that was the subject of a  
26 construction contract awarded to the plaintiff. *Id.* at 609. EBI and the plaintiff extensively  
27 negotiated the terms of an agreement to provide the discovery sought by the third-party subpoena  
28 which did not include the costs of compliance. *Id.* at 609-10. When EBI threatened not to produce  
any documents unless the agreement provided for costs of compliance, the plaintiff refused and  
threatened to file a motion to compel. *Id.* at 610. EBI then produced documents and sought its  
costs. *Id.* The court denied the request for costs noting that “[w]hen it was served with the  
subpoena, EBI did not object to compliance and did not make any effort to indicate it would be  
seeking reimbursement of costs as a condition of compliance. EBI did not move to quash or  
modify the subpoena....[n]or did it object in writing to compliance as unreasonable.” *Id.* at 612.
- In *Balfour Beatty Infrastructure, Inc. v. PB & A, Inc.*, 319 F.R.D. 277 (N.D. Cal. 2017) (Opp.  
13:10-13) the defendant served a subpoena on nonparty URS Corporation seeking documents  
related to the defendant’s work on a project. *Id.* at 279. URS objected to the subpoena and the  
parties engaged in discussions regarding the scope. *Id.* URS moved for costs related to its



production and sanctions, after the defendant cancelled a deposition at the last minute. *Id.* at 280-81. The court denied the vast majority of the requested costs, finding that URS had provided no evidence that they could not bear the costs of production and that the complaint alleged that URS was involved in the underlying acts that gave rise to the lawsuit. *Id.* at 282. Specifically, URS had been hired to ensure compliance with contractual specifications and the defendant was alleged to have failed to properly design aspects of the project within those specifications. *Id.* at 282-83.

As NEA timely objected to the Subpoena and is, to date, focused only on the propriety and scope of the Subpoena, Plaintiff has provided no basis for this Court to discount NEA's well-founded objections to the Subpoena itself.

1. **Plaintiff has provided no justification for the extensive time frame of his Subpoena.**

Plaintiff's attempt to minimize the extensive time frame of his Subpoena also falls well short. According to Plaintiff, "[t]he time frame of Zeleny's subpoenas *directly* corresponds to the time frame of Zeleny's protests and NEA's efforts to stop those protests." (Opp. 14:9-11) (emphasis added.) According to Plaintiff, he commenced his protests in 2005 (Zeleny Decl. ¶ 11), and yet his Subpoena seeks documents from as far back as 1995 (*see* Lane Decl., Exh. A, Request No. 17, Topic No. 16), and the Subpoena's general instructions with respect to producing documents require NEA to search the year 1999, as well. (NEA MTQ 5:16-7:2.) Plaintiff did not even bother to provide a default time period in the Instructions & Definitions to Plaintiff's topics of testimony, and so for ten of these topics, Plaintiff seeks testimony from an undefined and unlimited period of time. (Lane Decl., Exh. A, Topic Nos. 1, 6-10, 13, 15, 19 & 20.)

The only other justification Plaintiff proffers for the extensive time frame of his Subpoena is that the information it seeks is relevant. (Opp. 14:16-18.). As demonstrated above and in NEA's opening brief, the information sought is not relevant to the claims in Plaintiff's Complaint, and hence provides no justification for the Subpoena.<sup>8</sup>

2. **Plaintiff's attempt to minimize the burden and cost of the Subpoena fails.**

Plaintiff's attempts to minimize the burden and costs of NEA's compliance with the overly broad

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<sup>8</sup> Nor can Plaintiff justify the excessive scope of the Subpoena by the false claim that Plaintiff offered to limit the time frame of the Subpoena. (Opp. 14:18-20.) Plaintiff made no such offer and instead, declined to limit the time frame of the Subpoena in any manner. This makes the situation vastly different than that in *Balfour Beatty*, 319 F.R.D. at 283, where a third party sought sanctions after producing documents. The court declined to award sanctions, noting that although the initial subpoena contained no limiting time frames, prior to the production counsel agreed to limit the scope of the subpoena to a three-year period, and hence the subpoena did not provide a basis for imposing sanctions.



1 Subpoena are illogical and ignore the realities of document collection and review.

2 Plaintiff first attempts to downplay the amount of data that the Subpoena requires NEA to collect  
3 and review by referencing a previous litigation between the parties and asserting that the discovery sought  
4 by the current Subpoena would be comparable to the discovery produced in that matter. (Opp. 16:5-9.)  
5 In so doing, Plaintiff fails to provide this Court with any information regarding the previous lawsuit,  
6 including the causes of action asserted,<sup>9</sup> the scope of the discovery sought (including the time frame),  
7 whether search terms were agreed to, and any negotiations between the parties regarding the scope of  
8 discovery. (*Id.*) Instead, Plaintiff merely asserts that NEA produced 134 pages covering the time frame  
9 2009 through 2011 (Affeld Decl. ¶ 3), and from this, Plaintiff makes the following leap:

10 The kind of information we would seek would be comprised of  
11 approximately the same volume as NEA produced in the 2010-2011  
12 litigation it filed against Mr. Zeleny, i.e., 134 pages. That production would  
13 suffice for the timeframe of the litigation. About the same volume would  
14 suffice for 2011-2014, the end of the unfounded criminal prosecution NEA  
persuaded the DA's office to pursue. About the same volume would suffice  
for the period from 2007 to 2009. A total of fewer than 1,000 pages of email  
would be expected....

15 (Affeld Decl. ¶ 24.) It is utterly opaque what Plaintiff means by "the same volume would suffice." Of  
16 the twenty-four requests for production, only four seek "documents sufficient" to demonstrate something  
17 (Lane Decl. Exh. A, Request Nos. 17-20), the rest seek "all documents." Plaintiff likewise fails to  
18 articulate any cogent basis upon which he assumes that the search for documents responsive to a Subpoena  
19 that seeks documents from 1995, 1999, and 2004 to present would result in the production of less than  
20 1,000 pages.

21 More fundamentally, what NEA may ultimately produce bears little relationship to what the  
22 Subpoena requires NEA to collect and review.<sup>10</sup> Before NEA can run search terms, it needs to collect the  
23 data and process it. Otherwise, attachments, such as zip files and images such as PDFs, will not be

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25 <sup>9</sup> In fact, that case involved an action for trespass (Zeleny Decl. ¶ 25), and consequently involved a single cause of action  
26 regarding just six days of activity. (Worcester Decl. Exh. E.) Defendant entered a general denial. (Worcester Decl., Exh. F.)  
27 Judgment entered in NEA's favor and Zeleny was ordered to pay \$25,000 (a sum he has never paid.) (Worcester Decl., Exh.  
G.) Hence, the amount of documents produced in that case is hardly predictive of the volume that Plaintiff's extensive  
Subpoena would require NEA to collect, review and produce.

28 <sup>10</sup> NEA agrees with Mr. Berliner that it is inconsistent with industry standards to collect and process all emails from an  
organization. (Berliner Decl. ¶ 9.) Unfortunately, while Plaintiff was apparently willing to tell Mr. Berliner that only  
approximately five custodians are likely to have relevant data, Plaintiff never suggested that to NEA. (Berliner Decl. ¶ 18.)



properly searched. (Worcester Decl., Exh. D (“In Exchange, a partially indexed item typically contains a file – of a file type that can’t be indexed – that is attached to an email message.”).) It appears that Mr. Berliner is proposing that NEA itself, as opposed to a vendor, collect the data (*i.e.*, run the search terms) and then export the results of those searches to a vendor or NEA’s law firm. (Berliner Decl. ¶ 15.) Such a suggestion is curious, as it ignores best practices. *National Day Laborer Organizing Network v. U.S. Immigration & Customs Enforcement Agency*, 877 F. Supp. 2d 87, 108 (S.D.N.Y. 2012) (“most custodians cannot be ‘trusted’ to run effective searches”); Fed. R. Evid. 902(14) (allowing the authentication of electronic evidence by written affidavit of authentication of a “qualified person,” who must at a minimum, check the “hash value” of the copy and that it is identical to the original). In light of Plaintiff’s overly broad requests that seek, for example, all communications with news organizations regarding WebEx and Northern Light (business entities that NEA invested in), and all communications regarding the management or corporate governance of WebEx (a company in which NEA invested years before Plaintiff’s protests ever began), Plaintiff’s blithe dismissal of the significant effort and costs involved in complying with his Subpoena is without merit.

### CONCLUSION

In sum, Plaintiff is attempting to use his suit against the Defendants as a “hook” to obtain documents from NEA that have nothing to do with the constitutionality of the Defendants’ actions. Plaintiff has failed to demonstrate that the two decades of documents that he seeks are relevant to his claims, and requiring NEA to comply with the overly broad Subpoena would hardly be proportionate. For all the reasons set forth above, as well as in NEA’s Motion to Quash and Memorandum of Law in Support of Same, NEA respectfully requests that this Court quash Plaintiff’s Subpoena, and issue a protective order to protect NEA and its current and former personnel from further subpoenas from Plaintiff.

### FOLEY & LARDNER LLP

February 15, 2019

/s Roger A. Lane  
 Roger A. Lane  
 Attorneys for Non-Party  
 New Enterprise  
 Associates



PROOF OF SERVICE

I hereby certify that on February 15, 2019, I electronically filed the foregoing document using the Court's CM/ECF system. I am informed and believe that the CM/ECF system will send a notice of electronic filing to the interested parties.

/s/ Roger A. Lane  
Roger A. Lane